Supreme Court, U. S.
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No. 79-1525

In the Supreme Court of the United States

OCTOBER TERM, 1979

BYRON H. NAISBITT, Executor of the Estate of CAROL NAISBITT, Deceased; BYRON H. NAISBITT, As Guardian Ad Litem of CORTNEY NAISBITT, LAURA W. SWORD, Administratrix of the Estate of SHERRY MICHELLE ANSLEY, Deceased; ORREN W. WALKER JR.; and ORREN W. WALKER, JR., Administrator of the Estate of STANLEY O. WALKER, Deceased

Petitioners,

v.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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QUESTION PRESENTED

Whether 28 U.S.C. Section 2680(h) bars an action against the United States alleging antecedent negligent

failure of the United States to supervise a person under its control with known dangerous propensities from committing foreseeable harms where such harms are ultimately inflicted by intentional torts.

STATEMENT OF FACTS

The factual statement of the respondent is an exercise in understatement. The "variety of offenses" (Brief of Respondent p. 1 - hereinafter cited as "Resp. p. .....") committed by Airmen Pierre and Andrews included brutal rapes, murders, and tortures. For these heinous crimes Pierre and Andrews have been sentenced to death. (A petition for certiorari to review a denial of *habeas corpus* in that case, *Pierre v. Morris*, 607 P.2d 812 (Utah 1980), is also currently before this Court.)

The petitioners alleged in their amended complaints, and for the purposes of this petition to review a summary judgment such allegations must be taken as true, that military and civilian command level authorities knew the following:

> That Pierre and Andrews were held in great fear by their co-workers and considered capable of committing murder;
>
> Their co-workers were advised never to remain in or be caught alone in the building with Pierre or Andrews;
>
> That Pierre was the prime suspect of the Ogden City Police Department in the Air Force Office of Special Investigations in a murder committed in Ogden, Utah during the Fall of 1973;

That Pierre had three pending criminal complaints charging him with automobile theft;

Andrews had been convicted of a felony prior to his enlistment in the Air Force;

That Pierre and Andrews were both known to have violent and dangerous propensities;

That on three occasions Pierre's Sergeant had released him from duty and ordered him to report for physchological or psychiatric evaluation;

That each time Pierre failed to report for the evaluations and no effort was made to determine why he did not report;

That psychiatric evaluations would have shown both Pierre and Andrews to be psychopathic and capable of committing the heinous crimes which resulted in this action.

ARGUMENT

The petitioners *are not* arguing here that the murders, rapes, and tortures were "ordered by agents of the federal government." (Resp. p.3.) The petitioners are also *not* arguing that the government should be held liable on a theory of *respondeat superior.*[1] (Resp. pp.3,4.) Finally, the petitioners *are not* arguing that

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[1] **While the petitioners did agree below that a mere employer/employee relationship creates no duty on behalf of the employer to control the acts of the employee, such an admission is not determinative of this case. Petitioners' claim here is not based on a respondeat superior theory. Rather, the petitioners argue here for a duty in one who has control over third persons with known dangerous propensities. These two theories are entirely the other. No Utah case has considered the second theory but the general law of the country supports it. Tarasoff v. Regents of the University of California, 529 P.2d 552 (Cal. 1974).**

the crimes of Pierre and Andrews were not assaults and batteries. (Resp. p.5.)

What the petitioners contend here, and have contended all along, is that the government is responsible for its antecedent negligent failure to supervise persons under its control, whom it knew to have dangerous propensities, and to prevent them from inflicting foreseeable harms. Moreover, for the purposes of this petition, the petitioners contend that there is a direct conflict among the Circuits on this issue and that it is of sufficient importance for this Court to review this case.

I

THE CONFLICTS IN THE CIRCUITS IS NOT EXPLAINABLE BY FINDING AN "IMPLIED EXCEPTION"

Respondents' Brief in Opposition represents a dramatic change in its position. In both the District Court and the Tenth Circuit respondent contended, and the courts below agreed, that 28 U.S.C. Section 2680(h) was an absolute bar to suits, such as the instant case, where the ultimate injury was inflicted via intentional acts of government employees. Relying on dicta of this Court in *United States v. Muniz*, 374 U.S. 150 (1963), respondent and the lower courts found a presumed distinction in 28 U.S.C. Section 2680(h) between assaults committed by employees and those committed by non-employees.[2]

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[2] Respondents claim that 28 U.S.C. Section 2680(h) is a "flat prohibition against suits 'arising out of' assault or battery" (Resp. pp. 5, 10 fn. 12) is clearly incorrect. The injuries inflicted in **Muniz** were certainly assaults and batteries and this

Respondent now concedes that the government may be liable for its negligence in allowing assaults by employees. (Resp. p. 8.) *Gibson v. United States*, 457 F.2d 1391 (3rd Cir. 1972);[3] *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966); *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956). However, respondent attempts to distinguish these cases by finding an "implied exception" where the employee was in a jail, mental institution, or similar facility. (Resp. pp. 7-9.)

Such a distinction is unavailing for two reasons. First, the distinction is non-existent and second, assuming *arguendo* its existence, the petitioners here are well within its bounds as stated in respondents' Brief.

While it is true that *Underwood* and *Fair* both involved the negligent release of an employee from a

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Court found that 28 U.S.C. Section 2680(h) was not a bar to plaintiff's recovery. Such a "flat prohibition" would have also provided the rule of decision in the cases cited by respondent in its Brief, pages 7 through 9.

Moreover, respondents' intimation that 28 U.S.C. Section 2680(h) changes the general tort law rule of "intervening cause" for purposes of Tort Claims Act cases, by mandating that assaults and batteries are always to be regarded as relieving the government of liability for antecedent negligence, (Resp. p. 5 fn. 6) is not only unprecedented, but also erroneous. Such an argument, if it were correct, would have also prevented the plaintiffs in **Muniz** from recovering. Such an argument, superceding State Tort Law which furnish the rules for decision, 28 U.S.C. Section 1346(b), would also have been a final answer in the case cited by respondent in its Brief, pages 7 through 9.

[3] With all due respect to the Tenth Circuit (Pet. App. A-12 fn. 4) the petitioners again point out to this Court that the assailant in **Gibson** was an employee and the Third Circuit emphasized this point in finding liability, holding that this gave the government a greater duty and opportunity to control his actions. **Gibson**, 457 F.2d at 1393, 1394.

mental hospital, *Gibson* did not. The assailant there was a "dangerous, mentally ill [person] . . . known to be violent, juvenile offender and drug addict." *Gibson*, 457 F.2d at 1394.[4] Thus, the common thread in these cases is not the superficial identity of the prior location of the assailants. Rather, it is the knowledge of dangerous propensities. See *Restatement, Second, Torts*, Section 319 (1965).[5] It is interesting to note that not one of these cases mentions an "implied exception" as the basis of its decision.[6] The petitioners submit that they properly plead knowledge of Pierre and Andrews' dangerous propensities. pp. 3, 4 supra.

Even should such an "implied exception" be found to exist, the petitioners' pleadings are well within its scope. As proposed by respondent such an exception would require that the government had "assum[ed]

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[4] Given the clarity of the holding in **Gibson** — "[i]n the case **sub judice**, the duty to control the conduct of the trainees is even stronger since they were employees of the United States at the time and definitely under its control," 457 F.2d at 1394 — The petitioners are simply amazed at respondents' continuing reliance on **Collins v. United States**, 259 F.Supp. 363 (E.D. Pa. 1966). (Res.p.4.) It hardly seems possible that respondent does not recognize that the Eastern District of Pennsylvania is within the Third Circuit.

[5] Section 319 provides: "One who takes charge of a third person person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."

[6] This knowledge of dangerousness is the proper factor distinguishing **Underwood** from the earlier Fifth Circuit case of **United States v. Shively**, 345 F.2d 294, (5th Cir. 1965) cert. denied 382 U.S. 883 (1965). In **Shively** there was no allegation of knowledge of dangerous propensities and thus no duty to control and no liability. In **Underwood** the allegation of knowledge of dangerous propensities was present and liability was found.

an affirmative duty to control their conduct in significant respects for the protection of the public." (Resp. p.9.) Having thus assumed such a duty the government would be then liable for its negligent performance. (Resp. p. 7.) Or, to paraphrase the position stated by the Tenth Circuit in *Sanchez v. United States*, 506 F.2d 702, 704 (10th Cir. 1974), "[t]o find that the [government] owed a duty to the public to protect its members from harm caused by the negligence of its [employees], it would be necessary to hold that the [government] had such control of the [employees] as to be able to control the [employees'] movements and actions at all times."[7]

The petitioners have consistently alleged and shown that the government had this kind of control over Pierre and Andrews. As the petitioners stated in their Brief to the Tenth Circuit, pp.19,20:

> Appellees' control over Pierre and Andrews is shown by the circumstances of military life. Persons from all over the country are brought to military bases, which supply all their needs and from which they are denied the right to leave without permission. Uniform Code of Military Justice ("U.C.M.J") Art. 15, 10 U.S.C. Section 815; Air Force Manual 110-3 Par. 10-13(b). It is within the inherent authority of a base commander to restrict an airman to the base to protect the public. Op.J.A.G.AF. 1952/24;

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[7] Respondent's quotation of **Sanchez** to the effect that liability would require finding that the school was similar to a jail or asylum (Resp. p. 9 fn. 11) is badly out of context. The jail or asylum mention is simply to provide an example of a situation in which the government would have total control of its employees and thus a duty to the public.

> A.F.M. 110-3 Par.15-5. Further, the base commander and lower officers have the power to restrict an accused airman to base for investigative purposes. Manual For Courts Martial, Par. 20(b), or as a non-judicial form of punishment. M.C.M. Par. 1316(b); U.C.M.J. Art 15, 10 U.S.C. Section 815; U.C.M.J. Art. 134, 10 US.C. Section 934.
>
> Additionally, the appellants contend that the appelee vountarily assumed a duty to control Pierre by ordering him to report for psychiatric evaluation and then not following up on these examinations or determining whether the evaluations were in fact performed. *Fair v. United States,* supra. Appellee also voluntarily assumed a duty to control Andrews because he was enlisted despite a previous felony conviction in violation of 10 U.S.C. Section 504 and 10 U.S.C. Section 8253.

Such allegations, and the allegations of knowledge of dangerous propensities on pages 3 and 4, supra, clearly bring the petitioners within the scope of any "implied exception".[8]

The petitioners have thus shown that there in fact exists a direct conflict between the opinion of the court below and other Circuits which have considered the issue. There is no "implied exception" which distinguishes this case from other cases, and, even if such an

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[8] It is difficult for the petitioners to comprehend respondents' claim that "petitioners wholly fail to identify a legally enforceable duty on the part of the government to [restrain Pierre and Andrews]." (Resp. p. 9.) The petitioners submit that at every stage of this case they have shown such a duty and a relationship between Pierre, Andrews and the Air Force far greater than merely employer/employee.

exception is found, the petitioners are included in its scope. Accordingly, this Court should issue a writ for certiorari to review this case.

II

THE ISSUE IS ONE OF IMPORTANCE REQUIRING THIS COURT'S DECISION

Respondent admits the importance of this issue when it states "the federal government . . . cannot reasonably be expected to account in money damages for the off-duty conduct of its several million civilian and military employees throughout the country." (Resp. p.4.) Though the issue is narrower than framed by that statement, the importance remains and is shown by the split in the Circuits.

This Court has held that courts should not act as "self constituted guardian[s] of the treasury [and] import immunity back into a statute designed to limit it." *Indian Towing Company v. United States,* 350 U.S. 61, 69 (1955). In *United States v. Muniz,* 374 U.S. 150, 159 (1955), the Court went even further and held that "the government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Federal Tort Claims Act extends to novel and unprecedented forms of liability as well." (Citations omitted.) The decision below represents a major departure from this Court's consistent position.

Is the government liable for its negligence allowing foreseeable harms from known dangerous persons

under its control? Only those committed by non-employees? Employees? Only in mental institutions? Jails? Always? Never? These are questions that only this Court can answer and the petitioners submit that this case deserves an answer.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted this 1st day of August, 1980.

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